



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (T&E-2006-09): INCAPACITY: HIPAA CONFORMITY

TO: State Bar Office of Governmental Affairs

FROM: Barry Fitzpatrick, Chair, Executive Committee,
Peter Stern, Advisor, Executive Committee, and Chair, Incapacity Committee
Neil F. Horton, Member, Executive Committee, and Chair, HIPAA Work Group
Trusts and Estates Section, State Bar of California

DATE: August 1, 2005

RE: Amendment of Probate Code §4690, Health and Safety Code §123105, and Civil Code §56.13 to Conform California Law to the Health Insurance Portability and Accountability Act (HIPAA) -- (Project No. 2005-1)

SECTION CONTACTS:

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DATES OF APPROVAL:

Trusts and Estates Section Incapacity Subcommittee: November 8, 2004, unanimous vote
Trusts and Estates Section Executive Committee: November 13, 2004, unanimous vote

DIGEST:

Recent federal regulations under the Health Insurance Portability and Accountability Act (“HIPAA”),¹ which in general preempt contrary state law,² highlight the need for patients to have currently effective advance health care directives under California’s Uniform Health Care

¹ Pub. L. 104-191, 110 Stat. 1936; the regulations are found at www.hhs.gov/ocr/regtext.html.

² 45 CFR § 160.203.

Decisions Act.³ Under HIPAA, physicians and other “covered entities” may disclose otherwise protected health information to a patient’s health care agent under a valid authorization.⁴ HIPAA gives a patient’s “personal representative,” absent certain circumstances, the same right as the patient to access the patient’s medical information.⁵

A health care agent should be able to obtain and communicate information about the principal’s health. At present, however, although California requires physicians to disclose information to health care agents,⁶ it does so in a manner that is contrary to HIPAA regulations.⁷ HIPAA preempts contrary state law, unless state law relating to privacy of health information is more stringent.⁸ Moreover, California law does not treat health care agents consistently. While physicians must disclose relevant information to health care agents,⁹ those disclosures are not protected from liability under California’s Confidentiality of Medical Information Act.¹⁰

The proposed legislation:

1. Conforms California law to HIPAA regarding a physician’s ability to disclose medical information to a health care agent;
2. Clarifies that physicians incur no liability under CMIA for those disclosures; and
3. Sets standards under which health care agents may further disclose the principal’s medical information without liability under CMIA.

1. Conforming California law to HIPAA regarding physicians’ disclosure of information to a health care agent

Under Probate Code § 4690, if a question arises concerning the capacity of a principal under an advance health care directive, or if the principal is wholly or partially incapacitated, the agent may consult with and obtain information needed to carry out the agent’s duties from a broad category of persons and entities, including the principal’s physician, and others, including business entities and government agencies that may be subject to HIPAA. Probate Code § 4690 requires the person from whom information is sought to “disclose relevant information to the agent.”

Although HIPAA requires a “covered entity” to treat a “personal representative as the individual,” it contains an important exception. Under 45 CFR § 164.502(g)(5), “a covered entity may elect not to treat a person as the personal representative of an individual if:

- (i) The covered entity has a reasonable belief that:
 - (A) The individual has been or may be subjected to domestic violence, abuse, or neglect by such person; or

³ Probate Code § 4670 et. seq.

⁴ 45 CFR § 164.502(a)(1)(iv) and § 164.508.

⁵ 45 CFR § 164.502(g)(1).

⁶ Probate Code § 4690.

⁷ 45 CFR § 164.502(g)(5).

⁸ 45 CFR § 160.203 and § 160.203(b).

⁹ Probate Code § 4690.

¹⁰ Calif. Civil Code § 56 et. seq.

- (B) Treating such person as the personal representative could endanger the individual; and
- (ii) The covered entity, in the exercise of professional judgment, decides that it is not in the best interests of the individual to treat the person as the individual's personal representative.”

Because Probate Code § 4690 does not contain an exception similar to 45 CFR § 164.502(g)(5), HIPAA preempts it.

The proposed legislation amends Probate Code § 4690 to conform it to HIPAA.

2. Physician liability under CMIA for disclosing health information to agent

Under Civil Code § 56.10(b)(7), physicians and other health care providers must disclose medical information if compelled to do so by a “patient’s representative” under the Health and Safety Code. Health and Safety Code § 123105 defines a “patient’s representative” to include a minor’s parent or guardian, an adult’s guardian or conservator, or a deceased patient’s beneficiary or personal representative, but it fails to include an agent under an advance health care directive. The proposed legislation remedies this oversight.

3. Standards for disclosures by health care agents regarding the principal’s medical information

Civil Code § 56.13 limits further disclosure of medical information by certain categories of persons and entities to whom medical information may or must be disclosed. But it is silent on whether, or under what circumstances, health care agents under an advance health care directive may further disclose the principal’s medical information.

The proposed amendment to Civil Code § 56.13 allows health care agents to make additional disclosures of the principal’s medical information when it is consistent with the agent’s authority or when the agent determines that it is in the principal’s best interests.

ILLUSTRATIONS:

Conforming California law to HIPAA regarding physicians’ disclosure of information to a health care agent

The principal holds all her assets in a trust under which she is the sole trustee. The trust provides that she may be replaced as trustee if her physician certifies that she is not competent to manage her financial affairs. Her agent under a duly executed advance health care directive currently in effect asks her physician to so certify. The physician reasonably believes that the agent intentionally is abusing the principal. Under current Probate Code § 4690, the physician must disclose relevant information to the agent. Under the proposed amendment to Probate Code § 4690, the physician may elect not to treat the agent as authorized to receive that information.

Physician liability under CMIA for disclosing health information to agent

The principal holds all her assets in a trust under which she is the sole trustee. The trust provides that she may be replaced as trustee if her physician certifies that she is not competent to manage her financial affairs. Her agent under a duly executed advance health care directive currently in effect asks her physician to so certify. The physician recently administered a mental status examination to the principal, which indicated that the principal no longer is competent to manage her financial affairs. The physician believes that the agent is acting in the principal's best interests. Under current law, if the physician discloses that information to the agent, the physician may be liable for civil damages or other sanctions under CMIA. The proposed legislation allows the physician to provide that information without violating CMIA.

Standards for disclosures by health care agents regarding the principal's medical information

A reporter offers \$100,000 to an agent under an advance health care directive if the agent will confirm that the principal, a well-known talk-radio host, is being treated for addiction to pain-killing medications. The agent consults his attorney to determine whether the agent may disclose the information without liability to the principal. Current law does not explicitly forbid the disclosure, although the disclosure may violate general fiduciary duties. Under the proposed legislation, the attorney would be able to advise the agent that the disclosure would not be in the patient's best interests and, therefore, is not authorized under the advance health care directive.

DOCUMENTATION:

The impact of HIPAA and CMIA on estate planning has been the subject of the following articles: Hughes, *When Worlds Collide*, 24 CEB Estate Planning & California Probate Reporter 133 (June 2003); Basile, *HIPAA Privacy Rules: What's an Estate Planner to Do?*, 9 California Trusts and Estate Quarterly, Issue 4, 13 (Winter 2003); Horton, *Looking at Medical Privacy Rules from an Estate Planner's Perspective*, 9 California Trusts and Estate Quarterly, Issue 4, 5 (Winter 2003); see also, Camp et al., *CEB Action Guide, Capacity and Undue Influence: Assessing, Challenging, and Defending*, at pp. 15-24 (2003 Ed).

HISTORY:

Although HIPAA was enacted in 1996, its regulations did not become effective until August 2002. The legislature enacted CMIA in 1981 (Stats. 1981, c. 782, § 2). The legislature has established an Office of HIPAA Implementation ("CalOHI"), which has until January 1, 2008, to determine which provisions of state law HIPAA preempts. The authors of the proposed legislation referred to CalOHI's *HIPAA Preemption Analysis: Confidentiality of Medical Information Act* in drafting the proposed legislation.

PENDING LITIGATION:

None known.

FISCAL IMPACT:

The proposed legislation should reduce court filings, thereby reducing court expenses.

LIKELY SUPPORT/OPPOSITION:

The State Bar of California Trusts and Estates Section will support this legislation. There is no known opposition.

GERMANENESS:

The ability of health care agents to access medical information for estate planning purposes is a matter of great concern to estate planners. The subject matter of the legislation comes within the scope of the interests and knowledge of the Trusts and Estates Section of the State Bar of California.

TEXT AND COMMENTS:

SECTION 1. Section 56.13 of the Civil Code is amended to read:

56.13. (a) A recipient of medical information pursuant to an authorization as provided by this chapter or pursuant to the provisions of subdivision (c) of Section 56.10 may not further disclose that medical information except in accordance with a new authorization that meets the requirements of Section 56.11, or as specifically required or permitted by other provisions of this chapter or by law.

(b) A patient's representative under Health and Safety Code Section 123105(e) may disclose medical information when the disclosure is consistent with (1) the authority of an agent under a power of attorney for health care under Division 4.7, starting with section 4600 of the Probate Code or (2) the agent's good faith determination that such disclosure is in the principal's best interests.

Comment

This proposal explicitly allows health care agents to disclose their principals' medical information. But it limits the agent's ability to disclose medical information by requiring the agent to follow the standard set out in Probate Code § 4684, dealing with the agent's duty to make health care decisions for the principal. Because proposed § 56.13(b) governs the conduct of a person who is not a "covered entity" under HIPAA, HIPAA would not preclude this amendment.

SEC. 2. Section 123105 of the Health and Safety Code is amended to read:
123105. As used in this chapter:

(a) "Health care provider" means any of the following:

- (1) A health facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2.
- (2) A clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2.
- (3) A home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2.
- (4) A physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code or pursuant to the Osteopathic Act.
- (5) A podiatrist licensed pursuant to Article 22 (commencing with Section 2460) of Chapter 5 of Division 2 of the Business and Professions Code.
- (6) A dentist licensed pursuant to Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code.
- (7) A psychologist licensed pursuant to Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.
- (8) An optometrist licensed pursuant to Chapter 7 (commencing with Section 3000) of Division 2 of the Business and Professions Code.
- (9) A chiropractor licensed pursuant to the Chiropractic Initiative Act.
- (10) A marriage and family therapist licensed pursuant to Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.
- (11) A clinical social worker licensed pursuant to Chapter 14 (commencing with Section 4990) of Division 2 of the Business and Professions Code.
- (12) A physical therapist licensed pursuant to Chapter 5.7 (commencing with Section 2600) of Division 2 of the Business and Professions Code.
- (b) "Mental health records" means patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder. "Mental health records" includes, but is not limited to, all alcohol and drug abuse records.
- (c) "Patient" means a patient or former patient of a health care provider.
- (d) "Patient records" means records in any form or medium maintained by, or in the custody or control of, a health care provider relating to the health history, diagnosis, or condition of a patient, or relating to treatment provided or proposed to be provided to the patient. "Patient records" includes only records pertaining to the patient requesting the records or whose representative requests the records. "Patient records" does not include information given in confidence to a health care provider by a person other than another health care provider or the patient, and that material may be removed from any records prior to inspection or copying under Section 123110 or 123115. "Patient records" does not include information contained in aggregate form, such as indices, registers, or logs.
- (e) "Patient's representative" or "representative" means a parent or the guardian of a minor who is a patient, or the guardian or conservator of the person of an adult patient, *or an agent under a power of attorney for health care under Division 4.7, starting with section 4600 of the Probate Code*, or the beneficiary or personal representative of a deceased patient.
- (f) "Alcohol and drug abuse records" means patient records, or discrete portions thereof, specifically relating to evaluation and treatment of alcoholism or drug abuse.

Comment

Adding the health care agent as a "representative" under Health and Safety Code § 12300 et seq. ensures that the health care agent, under Health and Safety Code §§ 123110(a) and (b), is

entitled to inspect and copy patient records on written request to the health care provider and on payment of reasonable costs. Under Civil Code § 56.10(b)(7), a physician or other care provider may disclose medical information if compelled by the patient's representative pursuant to Health and Safety Code § 123100 et seq.

SEC. 3. Section 4690 of the Probate Code is amended to read:

4690. (a) If the principal becomes wholly or partially incapacitated, or if there is a question concerning the capacity of the principal, the agent may consult with a person previously designated by the principal for this purpose, and may also consult with and obtain information needed to carry out the agent's duties from the principal's spouse, physician, attorney, *agent under a power of attorney under Division 4.5 or Division 4.7 of the Probate Code*, a member of the principal's family, or other person, including a business entity or government agency, with respect to matters covered by the power of attorney for health care.

(b) A person, *entity, or agency* from whom information is requested *must* disclose relevant information to the agent, *unless the provisions of paragraph (c) apply*. Disclosure under this section is not a waiver of any privilege that may apply to the information disclosed.

(c) *A physician, person, entity or agency that is a "covered entity" within the meaning of 45 CFR § 160.103 may elect not to treat the agent as the principal's authorized representative if:*

(1) The covered entity has a reasonable belief that:

(A) The principal has been or may be subjected to domestic violence, abuse, or neglect by the agent; or

(B) Treating the agent as the principal's authorized representative could endanger the principal; and

(2) The covered entity, in the exercise of professional judgment, decides that it is not in the best interests of the principal to treat the agent as the principal's authorized representative

Comment

Paragraph (a) adds an agent under a financial power of attorney or co-agent under an advance health care directive to the list of persons with whom a health care agent may consult.

Paragraph (b) requires the person, entity, or agency to disclose relevant information unless the exception under paragraph (c) applies.

Paragraph (c) is substantially identical to 45 CFR § 164.502(g)(5), except that it substitutes the words "agent" for "person," "principal" for "individual," and "authorized representative" for "personal representative."